

ACQUISITION ADVISORY PANEL

Meeting Minutes

October 27, 2005

The Auditorium, Federal Deposit Insurance Corporation
Washington, D.C.

The Acquisition Advisory Panel (AAP) convened its twelfth meeting on October 27, 2005 in the auditorium at the Federal Deposit Insurance Corporation (FDIC), Washington D.C. Ms. Marcia Madsen, AAP Chair, opened the meeting at approximately 09:06 AM.

The Chair welcomed everyone to the meeting and stated that today's agenda included presentations by speakers in the morning; and the afternoon session would be dedicated to presentations of findings by two of the six Working Groups, Interagency Contracting and Performance-Based Services Acquisition (PBSA).

The guest speakers and their affiliations were as follows:

Presenter	Affiliation	Attachment
Dr. Robert C. Marshall	Pennsylvania State University	Attachment 1
Mr. Timothy A. Beyland	Air Force Personnel Operations Agency	Attachment 2
Professor William E. Kovacic	George Washington University	Attachment 3
Mr. Jonathan Lewis Etherton	Interagency Contracting Working Group Co-Chairs	Attachment 4
Mr. Carl DeMaio Dr. Allan V. Burman	Performance-Based Services Acquisition Working Group Co-Chairs	Attachment 5

The Chair briefly reviewed the schedule and locations for the upcoming public Panel meetings. Marcia Madsen stated that the November 18th and December 16th meetings would be held at the FDIC auditorium and the November 29th meeting would be held at the General Services Administration (GSA) auditorium. The Chair turned the meeting over to the Designated Federal Officer (DFO) to call the roll.

Laura Auletta, the AAP's DFO, called the roll. The following Panel members were present:

Mr. Frank J. Anderson, Jr. (arrived late: 9:12 AM)
Dr. Allan V. Burman
Mr. Carl DeMaio
Mr. David A. Drabkin
Mr. Jonathan Lewis Etherton (arrived late: 9:36 AM)
Mr. James A. (Ty) Hughes, Jr.
Mr. Thomas Luedtke
Ms. Marcia G. Madsen
Mr. Joshua I. Schwartz (arrived late: 9:14 AM)
Mr. Roger D. Waldron

The following Panel members were not in attendance:

Mr. Louis M. Addeo
Mr. David A. Javdan
Ms. Deidre A. Lee

The Chair introduced the first presenter, Dr. Robert C. Marshall, Head of Pennsylvania State University's Economics Department, and Co-Director of the University's Center for Study of Auctions, Procurements and Competition. Dr. Marshall thanked the Chair for the invitation to speak to the Panel and stated that he had performed extensive research in the areas of bid protests, collusion and cartels. Dr. Marshall noted that he currently serves as a consultant on price fixing conspiracies and procurement procedures of private firms. Dr. Marshall discussed the benefits of competition, to include benefits to the taxpayer, e.g., lower prices and higher quality, increased innovative solutions, and shared-learning of cost-reducing solutions within industry. Dr. Marshall introduced arguments made by detractors of competition including that competition is expensive to both vendors and the Government; it discourages investment in vendor-agency relationships, and dampens innovation by reducing profits. Professor Marshall explained that competition is not the problem. He remarked that Government procurement officials have limited incentives to obtain a surplus for taxpayers, and their incentives are largely negative. He added that the Government should look to the private sector model for incentivizing its procurement professionals.

Dr. Marshall also provided comments on the use of interagency contract vehicles. He stated that the time and effort involved in a procurement should be based on the size of the requiring activity and quantities of the commercial items procured. For example, the time and effort expended for buying computer disks (CDs) for an office personal computer (PC) should differ from that associated with the purchase of CDs for the entire federal government. Dr. Marshall stated that the incremental benefits achieved in conducting a rigorous competitive procurement should be contrasted with the incremental cost of the procurement. In terms of recommendations, Dr. Marshall provided the following:

- Competition is good - do not waiver from this principle
- Expand budgets for conducting procurements
- Expand professional training for procurement personnel / workforce
- Clarify evaluation criteria for procurement personnel / workforce
- Create formal mechanisms for sharing of procurement experiences across agencies.
- Modify interagency contract vehicles - single agency procuring for many must account for the benefits that the many will attain from open competition
- Bid protests are a good concept, but should be revisited
 - Envision a panel of procurement experts
 - Very tight time frame
 - Defer to agency discretion
 - Completely eliminate inter-bidder settlements
 - Remedy - expand inclusion set, and directed awards (use sparingly)

Dr. Marshall invited comments and questions from the Panel.

Panel member Marshall Doke asked Dr. Marshall to elaborate on his suggestion that there should be greater specificity in the evaluation criteria. Dr. Marshall stated that, if it was absolutely clear that all the criteria have been met for making the best possible award, the ex-post evaluations should not second guess the procurement officials. Many times, he added, negative outcomes are generally due to a lack of specificity in the evaluation criteria.

Panel member Ty Hughes thanked Dr. Marshall for his excellent presentation and commented that the current operating environment is a limited acquisition workforce that faces enormous pressure to execute agency programs. Mr. Hughes added that there are enormous penalties for not getting money obligated and expended. Mr. Hughes asked Dr. Marshall for his recommendation on how to incentivize the acquisition community and to refocus its attention on competition. Dr. Marshall offered his comments only as an observation, saying that the issue would require an incremental study, but he emphasized that both vendor and federal acquisition communities have bright, motivated people that respond well to the right incentives.

Panel member Joshua Schwartz followed-up on the acquisition workforce issues, specifically the disparity between the resources, both qualitatively and quantitatively, in the private and public sectors. Dr. Marshall emphasized that the top-level procurement people in private companies came up through a community college system and they have extensive experience in running procurements and understanding the vendor community in a specific market. The companies have made deep investments in their resources to understand the markets and to deliver the best surplus to their organizations.

Panel member David Javdan asked questions regarding the definition and cost/benefits of competition. Dr. Marshall remarked that competition in the affirmative means the simultaneous consideration of offers, and added it is not a sequential consideration. Dr. Marshall discussed an inclusion set for a specific procurement involving bidding on a DoD solicitation for fighter jets, and emphasized the importance of understanding the incremental costs and benefits of obtaining bids from specific vendors. Dr. Marshall stated that DoD should look at the incremental cost to evaluate the bid, and determine upfront that there are no benefits to inviting that bid. Dr. Marshall offered to provide data on competition to illustrate these incremental costs and benefits.

Panel member Dr. Allan Burman commented on the importance of past performance when determining inclusion for competitive procurements. Dr. Marshall concurred with his statement. Dr. Burman asked a question on the use of consultants to assist with the due diligence process in narrowing the competitive range. Dr. Marshall replied that the approach is justifiable if it takes into account the expense of evaluating multiple bidders.

Panel members Carl DeMaio and Jonathan Etherton asked questions about Dr. Marshall's recommendation to issue modifications to interagency vehicles. Specifically, what is the value of these vehicles and how do we communicate this to the policy makers and buyers? In addition, what would Dr. Marshall suggest when reviewing vehicles like GSA Schedules or GovWorks? Dr. Marshall stated that GSA does take into account the fact that

they are buying for the Government as a whole, and added that he has some concern for those agencies that may be excessively restrictive on broader procurements.

Panel member Ty Hughes asked about the use of contract incentives and obtaining cost and pricing data when there is limited or no competition. Dr. Marshall stated that the mechanisms are fine, but that the vendor community is keenly aware of its responsibility, especially in head-to-head competition.

Panel members Marshall Doke and Joshua Schwartz inquired about the accountability of the workforce. Dr. Marshall stated that the Government procurement officials should be held accountable for their decisions, but not for the negative impacts which could not have been anticipated at the time of their decisions.

The Chair, Marcia Madsen, thanked Dr. Marshall for his insightful comments and recommendations. She added that some of the Working Groups might have additional questions for him and he agreed to assist.

Ms. Madsen introduced the second speaker, Mr. Timothy A. Beyland. She stated that Mr. Beyland was the Director of Plans and Integration, and Director, Air Force Personnel Operations Agency, Deputy Chief of Staff for Personnel, Headquarters U.S. Air Force. Mr. Beyland thanked the Chair, and identified four topics for discussion: requirements definition for services; use of interagency contracts; use of performance-based contracting; and, effective ways to narrow the competitive range for large services contracts. Mr. Beyland stated that there are four critical components to an effective contract and to contract performance. They include a good requirements statement, meaningful performance measures, an effective assessment plan, and the right incentives for the contractor to perform. Mr. Beyland stated that, for complex procurements, industry needs at least six months advance notice of the procurement in order to effectively bid on the solicitation. He emphasized the importance of communication and developing good relationships with industry partners and stakeholders.

In terms of interagency contracting, Mr. Beyland stated that the Air Force requests justification when using these instruments on high dollar/complex services requirements. He noted that “faster and easier” does not always equate to “best value” to the taxpayer. Mr. Beyland stated that the Air Force routinely uses interagency vehicles on non-complex procurement actions, and remarked that when conducting a performance-based service acquisition, it is critical that the “acquisition team” include all appropriate players such as industry partners and Government contracting and technical professionals. He emphasized that the development of meaningful measures and incentives must be discussed prior to the release of the solicitation. Mr. Beyland emphasized that communication and efforts of the entire acquisition team should not stop upon contract award; they must continue throughout the post-award phase. Mr. Beyland believes training on the use of performance-based service acquisitions must continue and become required for all acquisition professionals, including technical as well as contracting personnel. Mr. Beyland discussed his views on effective ways to narrow competition in large services contracts to include a 2-step process where all offerors are provided an opportunity to

compete, followed by a down select to the most viable offerors. He noted that the acquisition team must balance the need to reduce the competitive range against the costs of defending a protest by those eliminated from the range. Mr. Beyland opened up the floor for questions from Panel members.

Panel member Jonathan Etherton thanked Mr. Beyland for his insightful presentation and asked if the Air Force has an internal methodology or approach that they use to make decisions on whether to use interagency vehicles or do an in-house procurement. Mr. Beyland stated that he could not speak about what the Air Force uses today as he had not been in that position for two years; however, his choice when in that position was not to use interagency contracts unless there was a written justification. Mr. Beyland added that his procurement staff had to demonstrate that using interagency vehicles answered the mission requirements better and faster than awarding their own contract.

Panel member Marshall Doke asked if it is easier to specify what you do not want in a performance-based contract versus a traditional requirement. Mr. Beyland agreed and provided an example of a grass cutting service, contrasting it with a billion dollar acquisition to run information technology (IT) services.

Noting that the Panel had just heard the importance of competition from Dr. Marshall, Panel member Joshua Schwartz discussed an off-line exchange with Dr. Marshall. Professor Schwartz explained that in response to his question on division of responsibility between the host agency and the customer agency for ensuring competition in an interagency context, Dr. Marshall expressed his belief that this divided responsibility would result in neither agency assuming responsibility. Professor Schwartz then asked Mr. Beyland what role the Air Force assumes as a customer agency for getting competition when it utilizes interagency contract vehicles, and how successful use of these vehicles has been. Mr. Beyland stated that in his few years as the Program Executive Officer (PEO), he only ran one acquisition where he let them use another agency's contract. He noted that the Air Force spent a lot of time discussing which interagency contract would provide the best results. Mr. Beyland concluded that if it takes too long to figure out where to go, then you might be better off running your own acquisition.

Panel member Frank Anderson discussed the importance of acquisition planning in determining the best contract vehicle, and asked if the process leads to using an interagency vehicle, would he consider using it. Mr. Beyland stated that there is a tendency to select the easier and faster tool, especially when there is a tight requirement. However, he added that he was not a proponent of using interagency vehicles on major acquisitions (over \$100 million), but added that the Air Force frequently uses interagency vehicles on low dollar procurements.

Panel member Frank Anderson asked a follow-on question regarding Mr. Beyland's thoughts on training, specifically in the area of performance-based contracting. Mr. Beyland stated that the Air Force designs its own training, specific to services. He noted that every source selection team is provided specific training, focused on ensuring that the requirement statement is right. Mr. Beyland commented that part of the problem goes

back to training the right people. He remarked that one has to redefine what the acquisition workforce is for services acquisition because it is totally different from the acquisition workforce that buys weapon systems or major commodity items.

Panel member Marshall Doke remarked that a number of years ago, there was a good model where agencies had specific workforce groups that were responsible for maintaining a library of specifications. Mr. Doke asked if re-instating these groups should be recommended by the Panel. Mr. Beyland stated that on certain types of service requirements, it certainly could help. He added these groups still exist on an informal level. He cautioned that, in his opinion, the Federal Government would not be ready to take on the magnitude of setting up a database to support the multitude of services that are performed.

Panel Chair, Marcia Madsen asked a question regarding the competitive price point when using interagency vehicles for those procurements under the simplified acquisition threshold. Mr. Beyland clarified that the PEO shop is responsible for management and oversight for those procurements over the \$100 million threshold. In terms of ensuring the best price or best value, Mr. Beyland added that they believe the competitive market pressures drive the price to the right place.

Ms. Madsen asked another question about the process the Air Force has in place for the requirements definition, and noted that the Air Force has a reputation for an excellent requirements process on the weapon systems side of the house. Mr. Beyland stated that writing requirements for services has improved over the past few years. He commented that the Air Force uses a database of all their major acquisitions, and, therefore, knows when the contracts are going to expire. Mr. Beyland stated that they bring the acquisition team/requirements people in early to begin thinking about the follow-on acquisition. He added that they build their own acquisition team and involve all the people who will be affected by the services acquisition, pre-award and post-award. Finally, he emphasized that the process is not cheap; however, getting the right people in the room and building the acquisition team is critical to executing an acquisition.

The Chair thanked Mr. Beyland for taking time to address the Panel and for providing excellent comments. Mr. Beyland confirmed with Ms. Madsen that she could funnel follow-up questions to him through Ty Hughes.

The Panel Chair stated that Professor Schwartz was going to recuse himself from the next speaker since they are both on the faculty at the same institution.

The Panel recessed for a fifteen-minute break.

The Panel reconvened at 11:30 AM. The Chair introduced the final speaker, Dr. William E. Kovacic, Professor at the George Washington University Law School. Professor Kovacic thanked the Chair and the Panel members for the invitation to speak. He discussed a number of topics related to competition policies in Government procurement, including the rationale for promoting competition, designing competitive processes,

regulatory controls as a barrier to entry, credible commitments, preserving a competitive marketplace and institutional prerequisites. Some of the benefits to competition echoed Dr. Marshall's comments, such as competition providing a discipline over costs and prices - it improves quality and innovation, and reduces the need to invest in direct regulatory controls. Professor Kovacic stated that regulation does affect the level of competition, and he provided examples from domestic content requirements and limitation to foreign ownership. He emphasized the importance of developing relationships between the buyer and the seller, for keeping promises, allowing competitive return on investment, explaining decisions and resolving disputes fairly. In order to preserve a competitive marketplace, he stated that supplier collusion must be defeated. He noted that this could be accomplished by promoting entry and designing competitive procurements that will encourage vendors to participate. He added that buyers must also be cognizant of the impact of mergers and acquisitions on the procurement process, and encouraged cooperation between competing agencies. In closing, Professor Kovacic stated that it is critical that the Government attract and retain capable acquisition personnel, and that the Government should consider private sector models in terms of incentives and training. Professor Kovacic entertained questions from the Panel members.

Panel member Marshall Doke thanked Professor Kovacic for his excellent presentation. Mr. Doke asked if collusive bidding is a significant problem today at the Federal level. Professor Kovacic commented that the Departments of Justice and Defense have done a good job of improving the sophistication of the Federal purchasing arena in both detecting and defeating collusive schemes. He added that there have been some issues with interagency vehicles; however, these have also shrunk over the past several years.

Panel member Ty Hughes noted that Professor Kovacic had done a lot of work overseas and asked if he had seen how other government systems have tackled the issue of competition. Professor Kovacic stated that some of the international governments are tackling the issue in different ways and that it is hard to tell at this point if there is a better way. The results, he added, are not readily apparent.

Panel member Dr. Allan Burman asked Professor Kovacic if he had any suggestions for improving the capacities of the acquisition workforce. Professor Kovacic stated that there probably would not be any material changes to the compensation scheme. However, he added that agencies needed to be more imaginative and inventive in providing qualitative benefits to the workforce. He provided some examples that are currently in use to recruit and retain qualified individuals, such as flexible work schedules, daycare centers and telecommuting. Professor Kovacic emphasized the importance of making the workplace more attractive and interesting without reducing productivity. In addition, he stressed the importance of the continuity of training to enhance and preserve the institutional memory to keep institutional capability in-house.

The Chair, Marcia Madsen, asked a question on surrogates for competition as it relates to commercial practices. Professor Kovacic stated he did not have a systematic perspective on how the incorporation of services-related elements into the federal supply schedules has operated. He added that perhaps that kind of inquiry could be done at low cost, for

example, comparing the performance of a package of services bought off the schedule to what private sector enterprises are buying. Professor Kovacic continued to say that, at this point, one could ask if the Government is ultimately buying the same kind of item with the same kinds of outcomes. Therefore, he added, this would be a reason he would always want to keep one eye on what the private sector outcomes are for parallel types of projects.

The Chair requested if Professor Kovacic could point the Panel to some literature on mechanisms for testing commercial prices and surrogates for competition, such as Most Favored Customer. Professor Kovacic stated he would happy to do that, and said that there is a large body of theoretical literature on how well Most Favored Customer type arrangements work in practice.

Ms. Madsen asked Professor Kovacic to comment on private sector concerns on the Truth in Negotiations Act (TINA). Professor Kovacic stated that TINA or a similar auditing mechanism probably works well in theory, but not generally in practice. He added that it is possible that the attitude in the broad competition policy community is changing - as an example, he expounded on the specifics of the *Trinco v. Verizon* case that was decided by the Supreme Court.

Panel member Jonathan Etherton asked Professor Kovacic about where the responsibilities should be grounded for setting policies on interagency vehicles. Professor Kovacic stated that he didn't have a specific suggestion about where ultimate accountability should reside; however, someone should be responsible for seeing that the integration of policy-making across organizations occurs. Professor Kovacic added that the Office of Management and Budget (OMB) would be the appropriate platform, but that it is conceivable that other alternatives are desirable as well.

The Chair thanked Professor Kovacic for taking time to speak to the Panel.

The Chair recessed for a one-hour lunch at 12:28 PM

The Chair reconvened at 1:30 PM. She recognized Panel member David Drabkin for a special announcement. Mr. Drabkin thanked the Chair and noted the passing of Gregory McFarland, an active member of the National Contract Management Association. He added that Mr. McFarland was well known for improving many of the acquisition processes over his 30 years of federal service.

The Chair thanked Mr. Drabkin for the announcement and stated, "...many of us who have known Greg over the years feel a great sense of loss today."

Ms. Madsen provided an overview of the process that was going to be used for the six Working Groups in presenting their preliminary findings and recommendations. Ms. Madsen stated that the Interagency Contracting and PBSA Working Groups would present their preliminary findings today, and that the other four (4) Working Groups were expected to present their preliminary findings at the next Panel meeting on November 18th. The Chair stated that after the oral presentations at the public meetings, the written products

would be circulated to the Panel members for comment and revision. She noted that the revised draft Working Group reports would be posted to the AAP website for public review. The Chair reviewed a revised milestone chart for completion of the reports, and noted that the preliminary recommendations will be discussed in the December and January meetings.

The Chair introduced Jonathan Etherton, the Working Group Chair on Interagency Contracting to discuss the Working Group's preliminary findings. Mr. Etherton thanked his Working Group members and their staffs for their continued commitment and dedication to the project. Mr. Etherton reviewed the methodology used by the Working Group to arrive at its findings. Steps in the process included: gathering data from Congressional Reports & testimony, reviewing Government Accountability Office (GAO) and Inspectors General (IG) reports, reviewing statutory & regulatory guidance and analyzing Federal Procurement Data System –Next Generation (FPDS-NG) data on interagency contracting. He noted the Group's activity occurred over the course of many months and frequent meetings (17 to date). Working Group members approached development of issues by looking at four questions: What are interagency contracting vehicles? Why do agencies use them? How do agencies use them? And, how should agencies use them? Mr. Etherton said that this review of the issues has resulted in the draft report of Background and Statement of Issues that is posted on the AAP website. Mr. Etherton noted that the draft includes the discussion of the Working Group's decision to include examination of enterprisewide vehicles, such as SeaPort-e, in addition to governmentwide contract vehicles.

Mr. Etherton then reviewed the Working Group's Preliminary Findings. He said that the findings are clustered around three primary categories. The first is "Creation and Continuation of Interagency Contract Vehicles" under which the group found the following: 1) evidence of proliferation; 2) too much overlap of vehicles; 3) inconsistent oversight; and 4) incentivization for creation lacking. The Working Group believes the best approach to get at the problems in interagency contracting is to focus on these areas. A second primary category of findings is focused on competition, under which the group determined that the vehicles are subject to abuse. The Fiscal Year 2002 National Defense Authorization Act addressed this abuse by imposing Section 803 for DoD procurements. The Working Group found that a similar approach applicable to governmentwide vehicles is desirable. A third category of findings relates to the workforce. The Working Group found that although the interagency contract process is characterized by a streamlined approach, in many instances relating to services, the transactions are very complex. The Working Group determined that more attention needed to be paid to training the workforce and ensuring the appropriate skill-sets are applied to interagency contracting. Mr. Etherton opened up the floor for comments and questions.

Panel member Carl DeMaio stated that the report was very comprehensive, but asked that the Group address the following: 1) provide some examples of where there might be duplicate services at different price points; 2) add to the "Creation and Continuation" section a discussion of the severe lack of understanding of how the interagency vehicles work and operate; and, 3) identify reasons why there are vehicles with overlapping

products. Mr. Etherton stated that these valid points that the Group could develop further, and that some of these concerns were addressed in the background section of the report.

The Chair praised Mr. Etherton and his Working Group on how well the background issue section was researched and written. Ms. Madsen told the Panel members that, if they were commenting on other Working Groups' products, it would be helpful if these comments were provided in writing and/or draft language that would be submitted to the Working Group Chairs.

Panel member Allan Burman commented on the acquisition workforce challenges, such as the lack of comprehensive training requirements. Dr. Burman added that some of these issues would also be addressed by Professor Schwartz's Acquisition Workforce Working Group. Mr. Etherton concurred, and noted some of these issues will migrate out as they are cutting across all of the Working Groups.

The Chair asked the Interagency Contracting Working Group about the status of its obtaining data on proliferation of vehicles. Mr. Etherton referred the question to Ms. Auletta because she has been tasked to retrieve the FPDS data.

Ms. Auletta provided a summary of the data reports she had received to date. She noted that some of the information on multi-agency contracts that are not GWACS or schedules is difficult to obtain because FPDS-NG did not start collecting that data until 2004.

The Chair thanked Mr. Etherton for his excellent progress to date. Ms. Madsen introduced the Co-Chairs of the PBSA Working Group, Mr. Carl DeMaio and Dr. Allan Burman.

Carl DeMaio thanked the other Working Group members and their staffs for their outstanding contributions to date. Mr. DeMaio acknowledged Diane Newberg for her matrix of recommendations culled from public meeting testimony that she developed for the Working Group draft report. Mr. DeMaio and Dr. Burman briefed the Panel on the Working Group's findings, noting that the AAP website includes a draft report addressing the Background and Statement of Issues (Report Parts I & II). The Working Group's preliminary issues center upon the failure of PBSA to be fully implemented by the federal Government. The Working Group's findings are as follows:

- Agencies are unsure when to use PBSA
- PBSA documentation continues to focus on activities and processes instead of performance and results
- PBSA potential to generate transformational solutions to Government challenges remains largely untapped
- Within the acquisition community, a focus on "getting to award" exists
- Post-award performance monitoring and management need to be improved
- PBSA incentives are not aligned to maximize continuous improvement
- FPDS-NG data has not proved to be a helpful tool in determining the use and success of PBSA.

Dr. Burman opened up the floor to comments and questions.

Panel member Frank Anderson stated that the Working Group did a great job, but offered a couple of comments. He cautioned them on assuming that performance and quality considerations are not significant elements of non-PBSA procurements. In addition, he suggested the Working Group should emphasize the use of transformational solutions and avoid using the phrase, “my mess for less,” because it may be misinterpreted by the acquisition workforce.

Panel member Marshall Doke asked about the finding that PBSA would save money and improve quality, and stated that there must be data to support that assumption - he provided an example from a recent GAO Report. Panel members David Drabkin and Roger Waldron also commented on the importance of accurate data to determine the clear benefits of PBSA to the taxpayer.

Panel member Thomas Luedke stated he was glad to see that the Working Group was addressing the challenges of contract management. He recommended that the Working Group emphasize the post-award phase of the contract cycle, specifically addressing the role of the Contracting Officer’s Technical Representative (COTR).

Panel member David Drabkin commented that there was a fundamental issue with performance-based contracting and services purchasing. Specifically, he stated, “despite the fact there is statutory language that prohibits the purchasing of personal services, we all know we are buying personal services every day.” He explained that while some restrictions may still be necessary, prohibitions on use of personal services should be eliminated. Mr. Drabkin further stated, “There ought to be a recognition that personal services aren’t for performance-based service contracting, because the contractor can’t offer you a solution and can’t come up with a method for reducing your costs or improving your performance.”

Panel member Thomas Luedtke remarked that when reviewing inherently governmental functions, the subject of personal services arises; therefore, the Inherently Governmental Working Group’s findings will address personal services. He commented also on the challenges associated with writing incentives and developing transformational solutions, specifically, the difficulty in achieving transformational benefits when the contract is constructed to give contractors only discrete tasks, but not the ability to manage the entire activity.

Several members also questioned the assumption that PBSA is appropriate for most procurements and added that while the approach has been promoted for fifteen years, the data does not exist to support that it is entirely successful for all types of requirements. It was suggested that training of the workforce in the PBSA technique is required and good data needs to be collected in order to draw conclusions. Based on the above discussion, the Co-Chairs, Dr. Burman and Mr. DeMaio agreed to re-visit some of the specific aspects of the findings.

Below is a list of additional materials or information requested during the guest speakers' presentations:

- Dr. Robert Marshall:
 - Provide data on the costs and benefits of competition, e.g., studies that provide the fully burdened cost of competition, the gain, and evaluation of the price obtained
- Professor William Kovacic:
 - Provide literature on the actual effects of Most Favored Customer and other customer type arrangements

There were no additional questions or comments regarding the two Working Group presentations, and the Chair adjourned the meeting. She reminded the public that the next AAP public meeting was scheduled for November 18, 2005 at FDIC, Washington D.C.

ADJOURNMENT

The DFO adjourned the twelfth Acquisition Advisory Panel meeting at 3:15 PM.

I hereby certify that, to the best of my knowledge, the foregoing minutes are accurate and complete.



Ms. Marcia G. Madsen
Chair
Acquisition Advisory Panel

JAN 25 2006

**Competition in Federal Procurement
Presentation to Acquisition Advisory Panel
October 27, 2005**

Robert C. Marshall

**Professor and Head of Department of Economics, The Pennsylvania
State University**

**Co-Director of Center for the Study of Auctions, Procurements, and
Competition Policy, The Pennsylvania State University**

Partner, Bates White, LLC

Personal background of relevance

- Research
 - Auction
 - Procurements
 - Bid protests (1988–1994)
 - Understand agency procurement
 - Collusion and cartels
- Center
 - <http://www.econ.psu.edu/~bickes/CAPCP.htm>
- Consulting
 - Price fixing conspiracies
 - Understand procurement procedures of private firms

Competition is good

- Why is this true?
- Then why are there detractors?
- Story
- Question
 - How is authorizing a restriction in competition different from authorizing collusion by vendors?

Benefits of competition

- Increases the overall size of the payoff for all of society
 - Without competition, higher prices and lower quality result
 - Reduction in quantity purchased
 - Agency may be willing to buy more at lower prices, and supplier may be willing to supply more at lower prices, but these incremental transactions never occur
 - Future planned purchases may be delayed or canceled because of the higher prices and lower quality
 - Increase public expenditures from higher prices and lower quality imply increased taxes or borrowing
- Revelation of important information
 - Vendors have specific knowledge that is only learned through competition
 - Why reveal a clever cost-reducing solution ex ante if there is no competition?
- Innovative solutions
 - Which question do you want a vendor addressing?
 - What is the minimum required to prevent the procurement official from opening the process to true competitive bidding? OR
 - What innovative solution do we need to put forward, and how cost-effective can we be in implementing this solution, in order to beat our competitors in this contest?

♦♦BATES♦WHITE♦♦

Arguments of the detractors

- Competitive purchasing is expensive
 - Understanding the needs and desires of the agency, writing a “good” bid solicitation, evaluating bids, “fairly” communicating information to bidders so that bids can be revised
- Competitive purchasing requires too much ex ante specificity about the commodity being purchased
 - The agency often does not even know what it wants to buy, so how can it write a bid solicitation?
- Competitive purchasing requires an unrealistic commitment, ex ante, to a scoring function
 - Often the agency does not want to ex ante commit to bid evaluation criteria when the bids may reveal information and aspects of the procurement that are not currently known to the procuring agency
- Competitive bidding is expensive for vendors
- Competitive bidding discourages investment in the vendor-agency relationship
- Competitive bidding discourages innovation by reducing profits of the awardee

**Which of these arguments is not true for the private sector?
Why do private sector firms use competitive procurements?**

Competition is not the problem. But something is causing opposition. What is it?

- Competition does not enhance the profits of vendors
 - Successfully advocating for and attaining an ex ante reduction in competition is like successfully colluding, but much better
 - Do we want vendors investing in better products and/or solutions or, alternatively, do we want them investing in influencing decisions regarding awards and award extensions?
- Procurement officials have limited incentives to obtain surplus for taxpayers
 - Takes work to evaluate surplus of each bid and little, if any, of their compensation is tied to the surplus produced from a procurement
- Procurement official incentives are largely negative
 - What did it cost to run the procurement? Why so much?
 - Did you learn something from the competitive bidding process that you should have known ahead of time? Why didn't you anticipate that?
 - Did you learn something that has caused you to realize that your bid evaluation criteria are inadequate? Why were they inadequate?
 - Did you select a vendor whose ex post performance is sub-standard? Why didn't you see that ahead of time?

◆◆◆BATES◆WHITE◆◆◆

“Nominal competition” (or, how not to have competitive procurements while nominally satisfying a mandate for competition)

- Employ a “consultant” who will knowingly writes an excessively restrictive bid solicitation, probably favoring their own firm or a firm with whom they work closely
- Write an excessively restrictive bid solicitation on your own
 - Benign ignorance, or,
 - Motivated by implied incentives, or,
 - Perhaps bad discretion
- Unjustly favor one firm in evaluation of bids
- Have inappropriate discussions with a favored bidder in the process of evaluating bids

Interagency contract vehicles

- Consider an example. How much time and effort should I spend in the procurement of writable CD's for PC's?
 - My one machine at home?
 - All machines at my office?
 - All machines in the entirety of a large university?
 - All machines in the entirety of the Federal government?
- What are the incremental benefits to the effort spent in conducting an ever more rigorous competitive procurement and what are the incremental costs?
 - Each of the four procurements above implies different thresholds
- But, why repeatedly incur procurement costs to buy the same commodity?
 - Good observation. But, delegate to a procurement authority that accounts for the potential magnitude of the purchase and thus the implications of unduly restricting competition.

Recommendations

- Competition is good. Do not waiver from this principle.
- Propose expansion of budgets for conducting procurements
- Propose expansion of professional training for people responsible for procurements
 - Make sure emphasis is on good procurement practice. The legal constraints should be known, but teaching them is not the same as teaching good procurement practice
- Propose clarity in evaluation criteria of people responsible for procurements
 - Propose greater specificity on how ex post evaluations will be done of procurements
- Propose creation of formal mechanisms for interagency information sharing regarding procurement experiences
- Propose modification to interagency contract vehicles—a single agency procuring for many must account for the benefits that the many will attain from open competition
- Bid protests are a good concept (private attorneys general), but should be revisited
 - Envision a panel of procurement experts
 - Very tight time frame
 - Defer to agency discretion
 - Completely eliminate inter-bidder settlements
 - Remedy—expand inclusion set, and, directed awards (use sparingly)

Competition in Federal Procurement

Presentation to Acquisition Advisory Panel

October 27, 2005

Robert C. Marshall

Professor and Head of Department of Economics, The Pennsylvania
State University

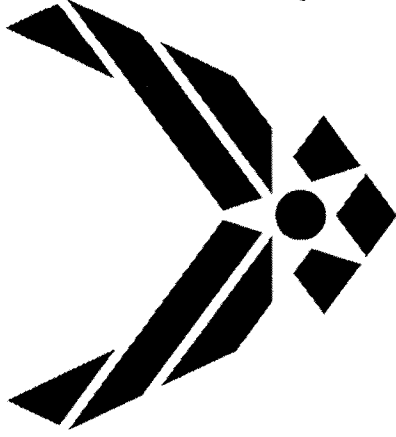
Co-Director of Center for the Study of Auctions, Procurements, and
Competition Policy, The Pennsylvania State University

Partner, Bates White, LLC

Headquarters U.S. Air Force

Integrity - Service - Excellence

Services Acquisition Reform Act Acquisition Advisory Panel



Mr. Tim Beyland
Director, Plans and Integration
Deputy Chief of Staff, Personnel

U.S. AIR FORCE



U.S. AIR FORCE

Topics for Discussion

✍ Requirements definition for services

- ✍ How does the AF define requirements to achieve competition?***
- ✍ How does the AF get to the price point?***

✍ Use of interagency contracts

- ✍ GSA Schedules, GWACs, other multi-agency contracts, franchise funds***

✍ Performance-based contracting

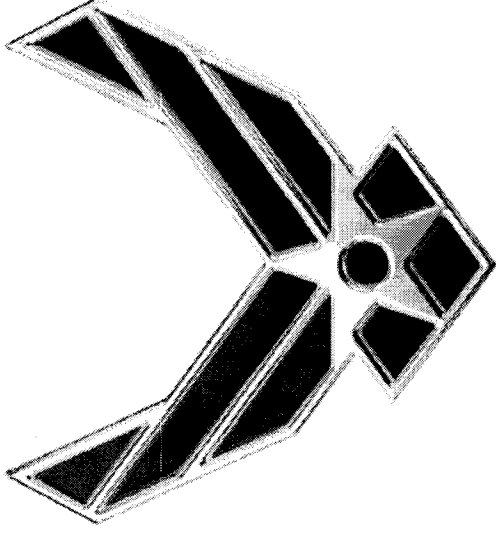
✍ Effective ways to narrow competition in large services contracts

- ✍ How to have real competition with a manageable field***



U.S. AIR FORCE


Questions?



U.S. AIR FORCE

Integrity - Service - Excellence

Competition Policy and Government Procurement



William E. Kovacic
George Washington University Law School
Acquisition Advisory Panel
Washington, D.C.
October 27, 2005



Presentation Overview

- Rationales for Promoting Competition
- Designing Competitive Processes
- Regulatory Controls as Barriers to Entry
- Credible Commitments
- Preserving a Competitive Marketplace
- Institutional Prerequisites



The Private Sector Baseline

- What Strategies Characterize Private Sector Purchasing?
- What Considerations Properly Warrant “Exceptionalism” In Government Procurement?



Rationales for Competition

- Benefits of Rivalry Among Suppliers
 - Discipline over costs and prices
 - Quality improvements
 - Innovation
 - Possibility for reducing investment in direct regulatory controls

Regulatory Controls and Entry

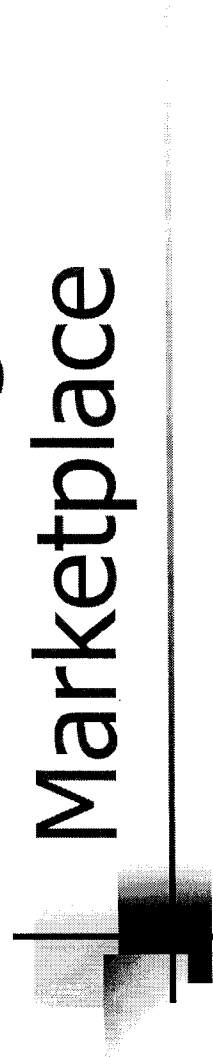
- Regulation Affects Level of Competition
- Examples:
 - Domestic content requirements
 - Limits on foreign ownership
- Paradox
 - Regulations to promote the public interest can increase the likelihood that the public interest will suffer



Credible Commitments

- Commitment and Competition
- Commitments That Attract Sellers
 - Keeping promises
 - Allowing competitive returns on investment
 - Explaining decisions
 - Resolving disputes fairly
 - Compare: Evolving approaches to public utility regulation

Preserving a Competitive Marketplace



- Defeating Supplier Collusion
 - Promoting entry
 - Designing competitive procurements
- Mergers and procurement
- Cooperation with competition agencies



Institutional Prerequisites

- Attracting/Retaining Capable Personnel
 - Comparison: The Private Sector Model
- Evaluating Results from Previous Procurements and Procurement Policies
 - Rationale for ex post assessment of
 - Processes
 - Specific programs

1423

Panel

Attachment 4

SECTION 1423 ACQUISITION ADVISORY PANEL

**Governmentwide Contracts and
Interagency Contract Vehicles
Working Group**

Presentation of Preliminary Findings

October 27, 2005

1423

Panel

Governmentwide Contracts and Interagency Contract Vehicles

Jonathan Etherton (Co-Chair)

Frank Anderson (Co-Chair)

Deidre Lee

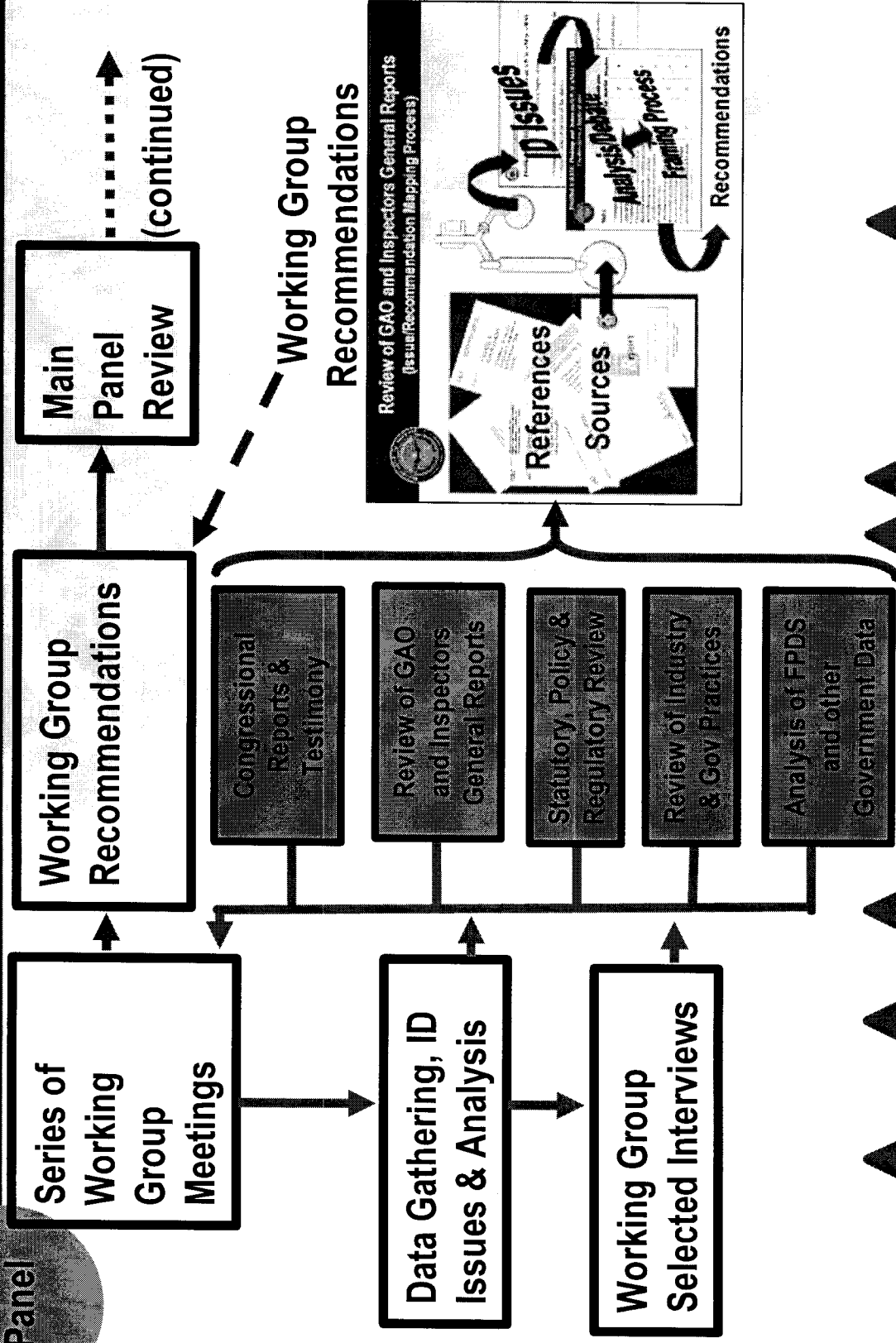
Thomas Luedtke

Melanie Sabelhaus/David Javdan

Roger Waldron

SECTION 1423 ACQUISITION ADVISORY PANEL RECOMMENDED METHODOLOGY

1423
Panel



Mar - Jul 2005

Aug - Sep 2005 Ongoing

Issues

Issues and recommendations arise from four basic questions:

- **What are they?**
- **Why do agencies use them?**
- **How do agencies use them?**
- **How should agencies use them?**

Contents of Draft Report to the Full Panel

- Introduction
- General Background
 - What are they?
 - Includes enterprisewide vehicles and assisting entities
 - Stakeholders
 - Why are they created and used?
- Issue: Creation and Continuation of Interagency Vehicles
 - Background
 - Findings
 - Recommendations
- Issue: Competition
 - Background
 - Findings
 - Recommendations
- Issue: Pricing (To Commercial Practices Working Group)
 - Background
- Issue: Acquisition Workforce (In coordination with Acquisition Workforce WG)
 - Background
 - Findings
 - Recommendations

Preliminary Findings

- Creation and Continuation

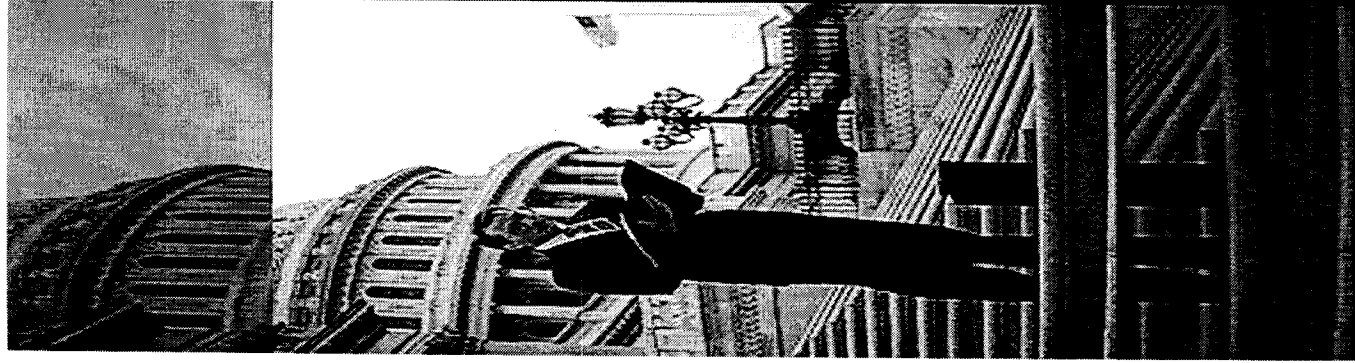
- Although the data are incomplete, there is evidence that interagency and enterprisewide contract vehicles are proliferating.
- There are too many vehicles with overlapping products and services.
- Oversight over the creation and continuation of vehicles is inconsistent.
 - There is no transparency concerning the vehicles and their use.
 - There is little systemic coordination among the vehicles.
 - There is no overarching business case requirement or other standards for the creation or retention of contract vehicles by agencies.
 - There are no procedures for aligning vehicles to leverage Government purchasing power.
 - There are no comprehensive measurements for performance of vehicles.
 - No system or standards for monitoring vehicle performance or relevance.
 - There are no consistent procedures or policies for allocation roles and responsibilities among the stakeholders in transactions using the vehicles.
- Current incentives for creating vehicles do not always translate into benefits for the taxpayer.
- Some diversity in contract vehicles and their approaches to meeting agencies' needs is desirable.
- Intensive focus on the process of creation and continuation of the interagency contract vehicles may be among the most effective means for dealing with many of the problems with the use of the vehicles.

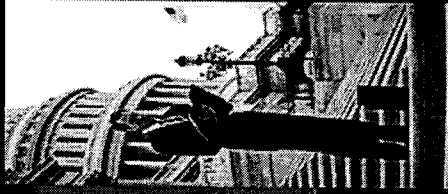
Preliminary Findings

- **Competition**
 - Effective competition in procurement of goods and services using interagency contract vehicles is essential for maintaining public confidence in the Government acquisition process.
 - Because of their streamlined process, interagency vehicles are open to abuse by agencies seeking to circumvent competition.
 - Section 803 of the National Defense Authorization Act for Fiscal Year 2002 appears to have increased competition in Department of Defense procurements using interagency contract vehicles.
 - The Department of Defense accounts for 60 percent of the orders using GSA schedules. The other 40 percent of non-Department of Defense agencies' orders have no requirement similar to section 803 governing such orders.
 - A governmentwide approach to this issue is desirable.
- **Workforce**
 - Although aspects of the interagency contract process are more streamlined, the nature of many transactions under these vehicles, such as those involving services, can be much more complex than a procurement using an agency contract.
 - Even though training is available for the use of certain categories of interagency contract vehicles, there are no comprehensive requirements for training agency acquisition professionals in the use of the vehicles.

Performance-Based Acquisition Working Group

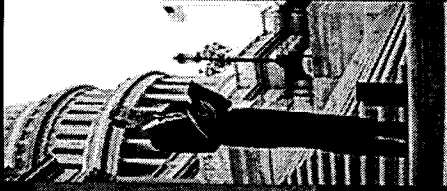
FINDINGS
October 27, 2005





Statement of the Issue

Why has Performance-based Services Acquisition not been fully implemented in the federal government?



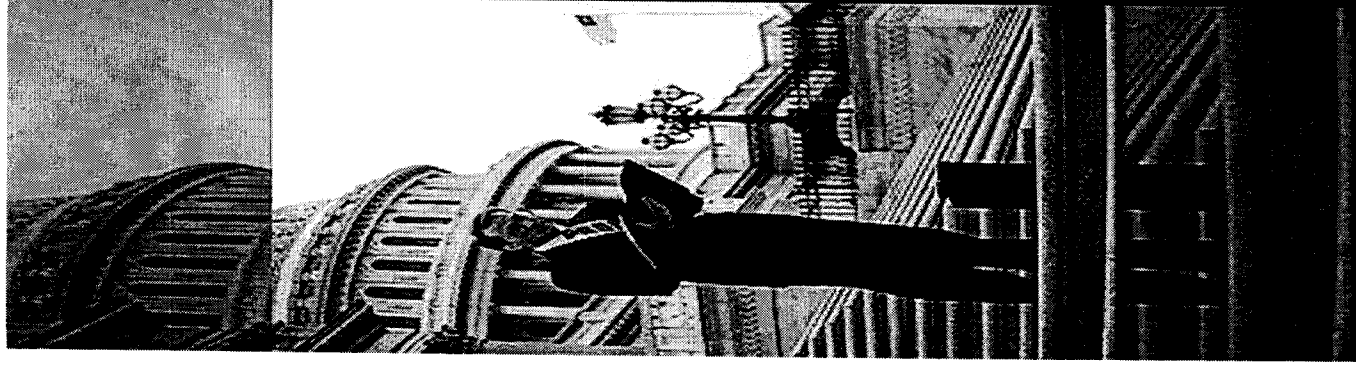
GAO Review of PBSA

“According to our reviews, agencies may have missed opportunities to take advantage of the benefits offered by...performance based service contracting, because of inadequate guidance and training, a weak internal control environment, limited performance measures, and data that agencies can use to make informed decisions.”

--Government Accountability Office

April 2003

Finding 1: Despite OMB Target, Agencies Remain Unsure When to Use PBSA





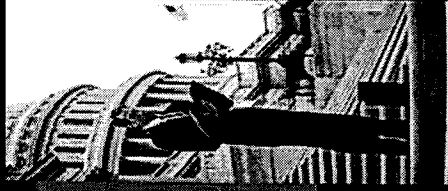
OMB Mandate

- ✍ OMB target of 40% has increased focus on PBSA as important tool
- ✍ However, target has caused some agencies to “force fit” PBSA for some procurements where its value may be limited
- ✍ While community resources like the 7-Steps website are helpful, OMB has provided little guidance on implementing PBSA



Misunderstanding Surrounding PBSA: When to Apply

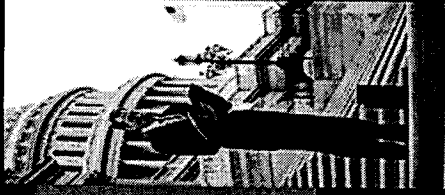
- ✗ Agencies express concern that PBSA is not a fit for all contracts
- ✗ This observation may be correct for acquisitions where “work activity” is procured without concern for quality or performance results (wherein the agency will take accountability for the quality and performance of the finished product)
- ✗ However, the majority of acquisitions can and should benefit from PBSA
- ✗ Greater clarity on PBSA’s definition and ideal usage should be provided



GAO Evidence

✧ Major inconsistencies in *how to define* PBC and *when to use* PBC (GAO 2002 Report)

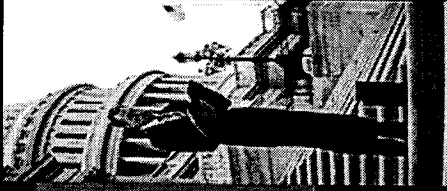
✧ Inconsistencies “raise concern as to whether agencies have a good understanding of performance-based contracting and how to take full advantage of it.”



Panel Supports PBSA for its Clear Benefits to the Taxpayer

- ✍ Increased likelihood of meeting mission needs
- ✍ Focus on intended results, not process
- ✍ Better value and enhanced performance
- ✍ Less performance risk
- ✍ No detailed specification or process description needed
- ✍ Contractor flexibility in proposing solution
- ✍ Better competition: not just contractors, but solutions
- ✍ Contractor buy-in and shared interests
- ✍ Shared incentives permit innovation and cost effectiveness
- ✍ Less likelihood of a successful protest
- ✍ Surveillance: less frequent, more meaningful
- ✍ Results documented for Government Performance and Results Act reporting, as by-product of acquisition
- ✍ Variety of solutions from which to choose

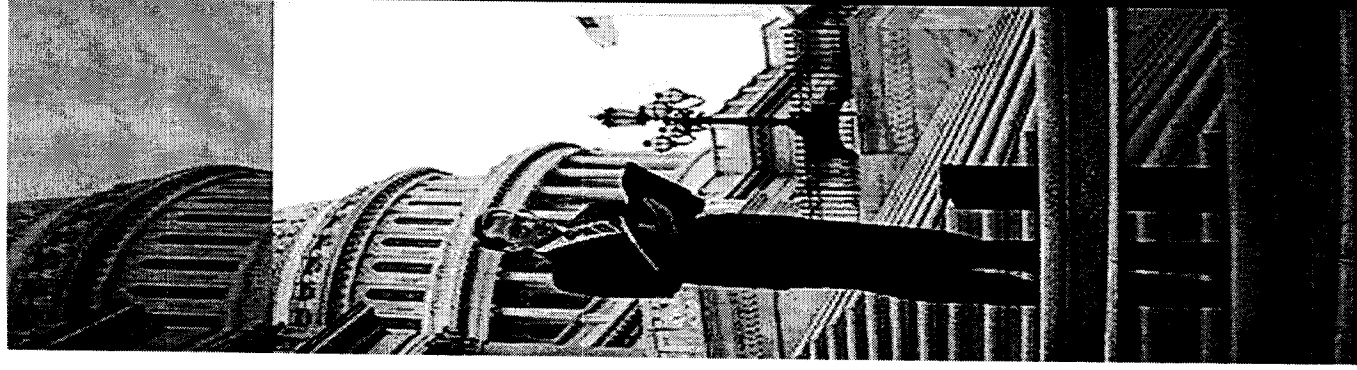
From "Seven Steps Process for PBSA" www.acqnet.gov

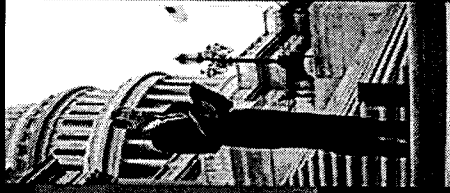


1998 OFPP Study

- ✂ 26 Contracts from 15 Agencies
- ✂ \$585 Million in net award value (range from \$100,000 to \$325m)
- ✂ Contract Price Impact: 15% cost savings
- ✂ Customer Satisfaction: 18% increase (3.3 to 3.9 on 5 pt. scale)
- ✂ Contracting Efficiencies
 - ✂ Increased number of offers (from 5.3 to 7.3)
 - ✂ Decreased contract audits by 93%

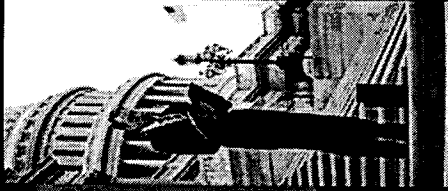
Finding 2: PBSA Solicitations & Contracts Continue to Focus on Activities and Processes, Rather than Performance and Results





Shifting from Defining Work Activities to Soliciting Results

- ✍ Performance-based contracting should focus on results achieved, and not the effort or activities undertaken to deliver those results
- ✍ Current federal PBCs tend to add a veneer of “performance measures” on top of lengthy, detailed statements of work
- ✍ Determining clear, results-oriented performance measures is also a challenge
- ✍ Agencies tend to do a poor job defining their “needs” in clear and results-oriented terms

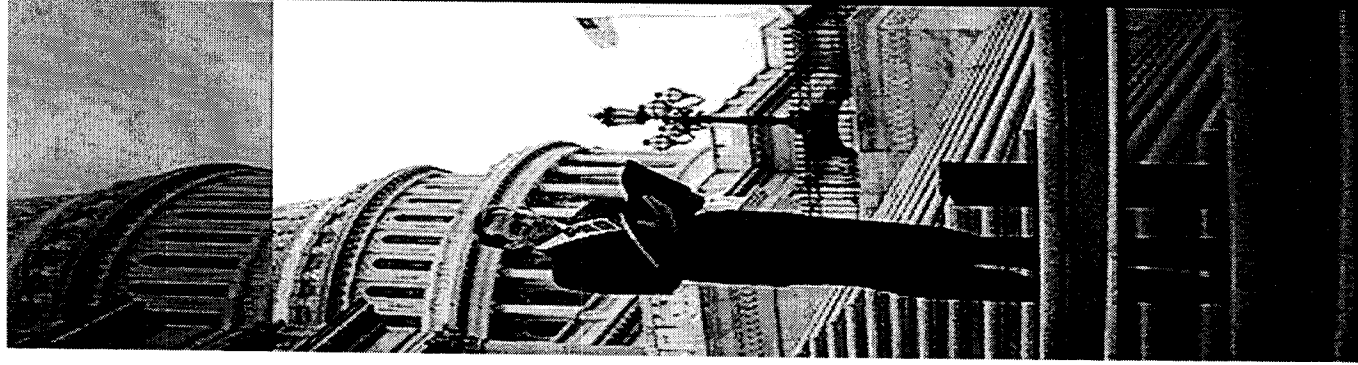


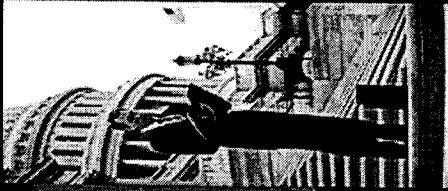
Overcoming Culture and Internal Stovepipes

- ✗ From a cultural perspective, it has proved very difficult for agencies to let go of simpler traditional ways of writing contract specifications – telling vendors exactly what to do.
- ✗ PBSA is not something the procurement community can do alone – program and financial elements within the government must also participate and contribute to make it a success

Finding 3:

PBSA's Potential for Generating Transformational Solutions To Agency Challenges Remains Largely Untapped

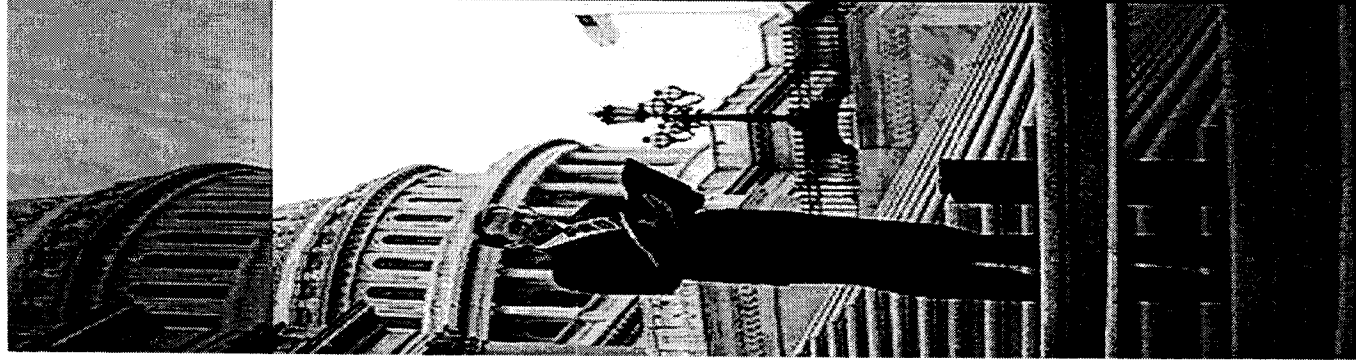


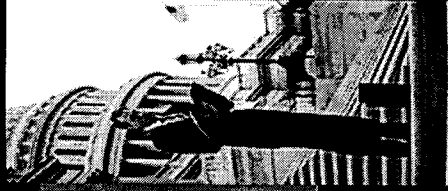


“My Mess for Less” vs. Transformational Solutions

- ✗ Related to Finding #2, an over-emphasis on “work activity” contracting shuts out innovative market solutions
- ✗ Creation of a “baseline” of agency current performance problems is rarely done in a solicitation
- ✗ The use of market research—while expanding—is under-utilized in federal acquisitions

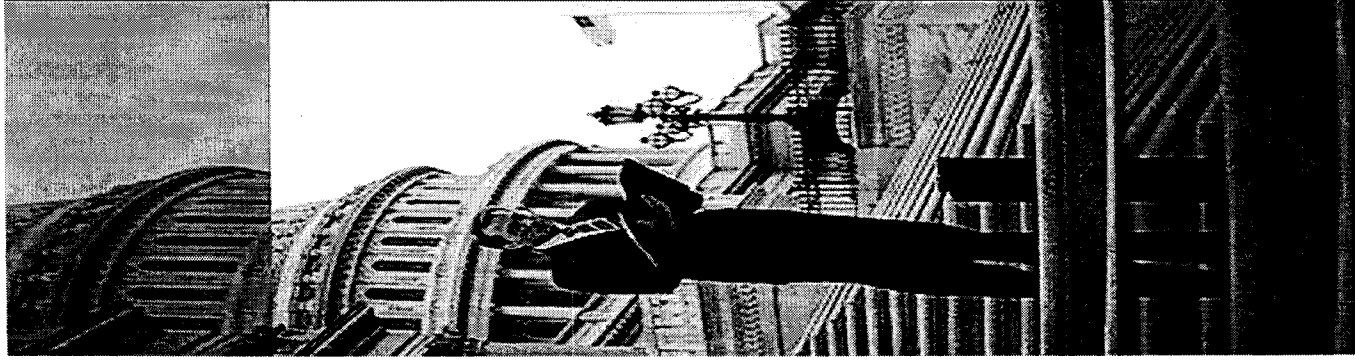
Finding 4: Within Federal Acquisition Functions, There Still Exists a Cultural Emphasis on “Getting to Award”





Slow Down to Hurry Up

- ✍ PBSA is a process that requires a significant preliminary effort to clarify agency needs, engage in innovative solutions development, and craft the right measures and incentives.
- ✍ This increased up-front investment of time, training and resources flies in contrast to the traditional culture of most acquisition shops under significant pressure from internal clients to get contracts awarded quickly.
- ✍ Client demand is exacerbated by an under resourcing in today's Federal acquisition workforce. In many organizations, the personnel and skill sets required to undertake the up-front research and planning simply do not exist



Finding 5:

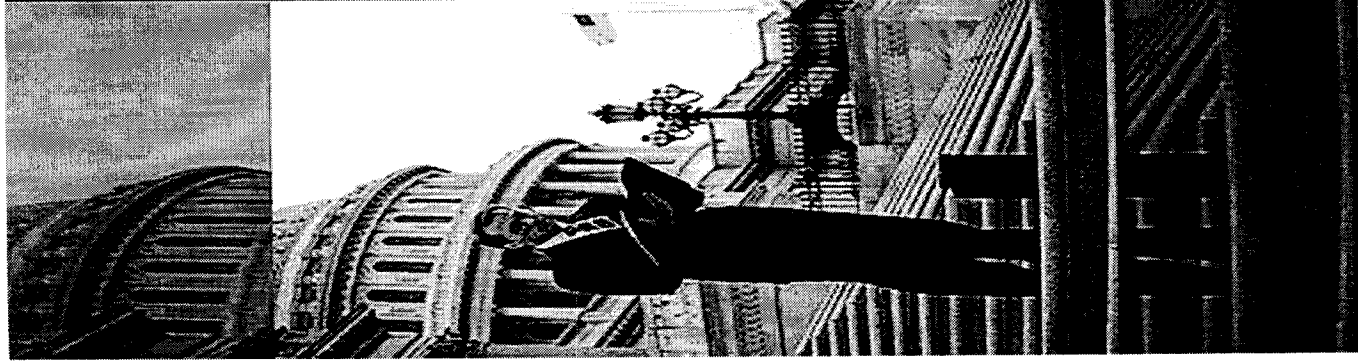
Post-Award Contract Performance Monitoring and Management Needs to Be Improved

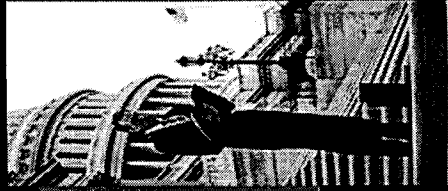


Emphasis on Contract Performance Management is Needed

- ✗ Performance-based contracting does not end with the award of the contract; it is an ongoing process of monitoring and managing existing contracts for improved performance.
- ✗ Agencies do not adequately collect performance information for individual contracts, let alone review and provide ongoing feedback and corrective action on vendor performance.

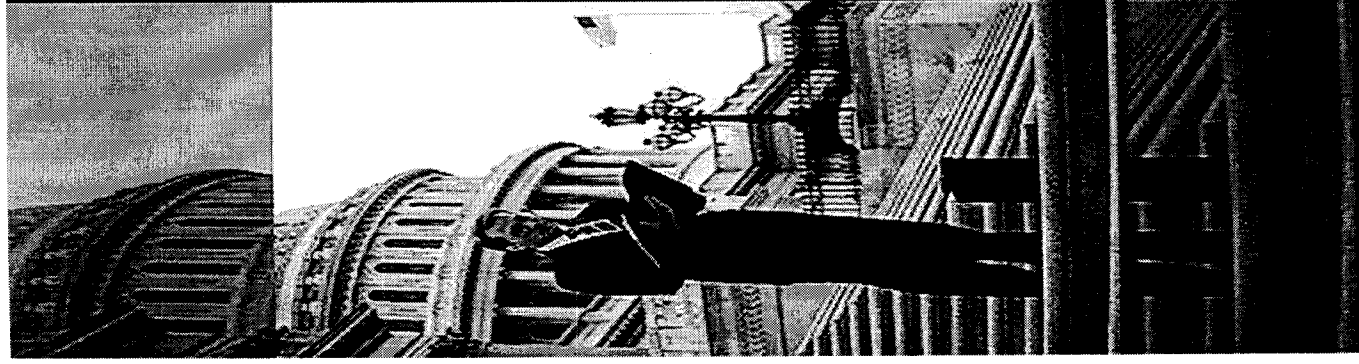
Finding 6: Most Contract Incentives Are Still Not Aligned to Maximize Performance and Continuous Improvement



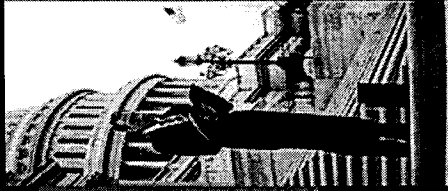


Use Incentives to Drive Results and Continuous Improvement

- ✗ An important element of PBSA is the use of incentives, both financial and non-financial, to promote improved results both agencies and the taxpayer expect.
- ✗ Incentives can present a risk if not properly constructed.
- ✗ In many cases, incentives are not fully aligned to encourage continuous improvement or innovation by the contractors for the government.



Finding 7: FPDS Data Are Insufficient and Perhaps Misleading Regarding Use and Success of PBSA



Frustrations with FPDs

- ✗ The working group found securing and analyzing data from FPDs to be a major challenge. Months after our initial request for information was submitted by staff, the Panel is still awaiting reliable data.
- ✗ Due to misunderstandings surrounding definition and use of PBSA, data may not be consistent and accurate in FPDs
- ✗ Much of the information about PBSA's successes and failures is still anecdotal